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No. 96-1896

In The

Supreme Court of the United States

October Term, 1997

CLIFF AND BERTHA GARDNER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF DAVID HAIGHT FOR LEAVE TO FILE OUT-OF-TIME BRIEF AMICUS CURIAE IN SUPPORT OF PETITION AND BRIEF AMICUS CURIAE

JOHN W. HOWARD
Counsel of Record
Attorney for Amicus Curiae
David Haight
625 Broadway
Suite 1206
San Diego, California 92101
(619) 234-2842

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MOTION FOR LEAVE TO FILE LATE BRIEF IN AMICUS CURIAE

Amicus Curiae hereby moves for permission to file his brief untimely. His motion for same is based upon the fact that he received no notice of the filing or docketing of the Petition for Writ of Certiorari until shortly before the time for filing the Brief in Amicus Curiae was due and too late for him to prepare same on a timely basis.

The Petition for Writ of Certiorari was apparently filed on May 27, 1997 and docketed on May 29, 1997. Notice thereof is required to be sent to all interested parties. Amicus Curiae did not receive notice of same until several days prior to the date upon which his Brief herein was due. Although Amicus Curiae is entitled, under the Rules, to thirty (30) days from the date of docketing to file his brief he did not receive actual notice of docketing until June 19, 1997, notice having been actually mailed on June 14, 1997, according to the postmark.

It would not be fair to deny Amicus Curiae the right to file his Brief in Amicus Curiae based upon this late notice and Amicus Curiae therefore respectfully requests that this Honorable Court grant leave for him to file his Brief late in light of the late notice he received.

Respectfully submitted,

JOHN W. HOWARD
Counsel of Record
Attorney for Amicus Curiae
David Haight
625 Broadway
Suite 1206
San Diego, California 92101
(619) 234-2842

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INTEREST OF AMICUS CURIAE*

A member of the Lyon County Public Lands Planning Commission, as *Amicus Curiae*, files this brief in support of the position of Cliff Gardner and Bertha Gardner, Defendants-Petitioners in this case.

The Lyon County Public Lands Planning Commission was established by County Ordinance as an advisory Commission to the County Commissioners. Its duty as the Public Lands Planning Commission is to keep abreast of problem public lands issues and activities and report the various problem areas back to the County Commissioners. In addition, the Public Lands Planning Commission is directed by the County Commission to investigate and/or study selected problems related to public lands and report its recommendations to the County Commissioners.

Each member of the Lyon County Public Lands Planning Commission has contact with the people directly connected with public land use, both Federal employees and users, on a continuous basis. Being a member has resulted in a detailed understanding of on-going controversies regarding public lands.

A large problem area connected with public lands is the so called "land exchanges". Information received from a "whistle blower" revealed that there were secret meetings, being conducted almost on a daily basis, in the Nevada state BLM office dealing with a "land exchange". In a subsequent meeting with the then State Director of the BLM he was asked why this exchange was not known by the public. His answer was "It is now.".

The land exchange resulted in the selling of a small amount of BLM land in the Las Vegas area, to be used by a land developer, resulting in a large increase in the tax base of Clark County. The money was then taken and used to purchase a large amount of

* Counsel for a party did not author this brief in whole or in part and no person or entity, other than the *amicus curiae*, has made a monetary contribution to the preparation or submission of the brief.

land in the Lake Tahoe area. This land had been slated for development as a ski resort and residential area. The end result was a huge loss to the tax base of Washoe and Douglas Counties.

Currently there is a "land exchange" in progress affecting Lyon County, Douglas County, the BLM, the USFS and a developer. The BLM will exchange a large amount of land, located in Lyon County, to be used as an industrial park. This land has a very high dollar value due to its intended use. A smaller amount of land to be received by the BLM and USFS in the "land exchange" could be classified as waste land.

On the surface it would appear that Lyon County was receiving a "windfall" in this "land exchange". However a small portion of this "wasteland", to become USFS land, is on the site of a previously-proposed dam to be constructed on the Walker River. This dam could put the Federal Government in a position to possibly control the water flow on the Walker River. Should this occur, it could have a devastating effect on agriculture in Lyon County. However, even if the dam scenario did not occur, the difference in property dollar value would result in a large loss to the taxpayers. This loss would result due to the large dollar value difference between the two land parcels.

A second problem is the apparent lack of credibility and accountability of Federal employees in their management of existing public lands. On one occasion the Lyon County Public Lands Planning Commission received data from a research corporation showing that grazing allotments for sheep issued from the USFS Bridgeport Ranger District, in the Humboldt-Toiyabe National Forest, were drastically reduced approximately 60% over a given time period. The Commission published these data. The Bridgeport Ranger District disputed the figures and claimed the decrease was only 6%. In a subsequent presentation made by the Bridgeport Ranger District to the Public Lands Planning Commission, it was shown, using their own data, that the decrease was approximately 50%. Later analysis showed the decrease to be closer to 60%.

The apparent lack of knowledge on behalf of the Federal Government relative to the proper management of public lands is obvious. It is time to rule that the position advanced by the Defendants-Petitioners that a State holds title to the unappropriated public lands within its external borders is a valid and proper legal decision.

ARGUMENT

I. THE IRRATIONAL REASONING OF THE APPEALS COURT

The position taken by the lower court cannot stand. To come to the conclusion that the original thirteen States and those States that were formed from the original unappropriated public lands have a sovereign claim to their lands that cannot be claimed by other States, would make those other States unequal.

Indeed, various States were formed from a multitude of different lands. There are three States that were formed from lands taken partially from the original territory and partially from other lands. These States are Minnesota, Mississippi, and Alabama. In the case of Alabama the vast majority of the State was made up from land taken from the original territory and just a small portion from land taken from the Louisiana Purchase. It is significant to note that within that small portion of land from the Louisiana Purchase lies the County and City of Mobile.

The Appeals Court in addressing the case, *Pollards Lessee v. Hagen*, 44 U.S. (3 How.) 212 (1845), takes the position that the Supreme Court decision was based solely on land coming from the States of Virginia and Georgia. And, therefore, Alabama had this sovereign claim to the land. However the land in question in the *Pollards* case was located within the City of Mobile. As previously noted, the land which includes the City of Mobile comes from the Louisiana Purchase not from the original States. This alone would make the lower court reasoning fail.

To go on further, the Supreme Court in the case, *United States of America v. Texas,* 339 U.S. 707 (1949), equates the States of Texas, California, and Louisiana in respect to the Equal Footing Doctrine. One would most certainly have to take the position that Texas had at least the same or even higher sovereign claim to its land as did the original thirteen States. Using this reasoning, the states formed from land that comes from the Louisiana Purchase and the treaty of Guadalupe Hidalgo have the same sovereign claim to their lands as do the original States.

In looking at the State of New Mexico, its lands are made up from the Texas Annexation, the Louisiana Purchase, and the treaty of Guadalupe Hidalgo. Using the rational of the lower court, should those lands in New Mexico that came from the treaty of Guadalupe Hidalgo be treated differently from those lands that came from the Texas Annexation and also differently from those lands that came from the Louisiana Purchase? I think not. Again, the reasoning of the lower court is not acceptable.

Congress recognized the claim to ownership of the unappropriated lands by the various States in 1832. At that time the Public Lands Committee of the United States Senate made a formal report to the Senate and stated:

> Our pledge would not be redeemed by merely dividing the surface into states and giving them names.
>
> The public debt being now paid, the public lands are entirely released from the pledge they were under to that object, and are free to receive a new and liberal destination for the relief of the states in which they lie.
>
> Nearly one hundred million acres now in market are the refuse of sales and

> donations through a long series of years, and are of very little actual value, and only fit to be given to settlers or abandoned to the states in which they lie.
>
> The speedy extinction of the Federal title within their limits is necessary to the independence of the new states, to their equality with the older states, to the development of their resources, to the subjection of their soil, taxation, cultivation and settlement, and to the proper enjoyment of their jurisdiction and sovereignty.
>
> The ramified machinery of the Land Office Department and the ownership of so much soil extends the patronage and authority of the General Government into the heart and corners of the new states and subjects their policy to the danger of a foreign and powerful influence.

To apply the thoughts of Congress stated above, one need only to look at two states, Louisiana and Missouri. Louisiana was admitted into the Union in 1812. Missouri was admitted into the Union in 1821. Both States were formed from land that came from the Louisiana Purchase. Both States were part of the Union before 1832. Therefore Congress must have intended for them to be included in the States that should receive ownership of all its public lands. These were not States that came from the original territory, as required by the lower court. Again, the lower courts reasoning cannot stand.

The appeals court reasoning goes even further in that it takes the position that the Federal Government held complete title to all public lands in Nevada prior to statehood and that Nevada never at any time had the same claim to title as did the original states. Because of this the lower court takes the position that the Federal

Government has complete ownership and legislation over these lands. If that were true there would be no need for Nevada to cede any of these lands to the Federal Government for any reason. Does that mean that Article I, § 8, cl. 17 of the United States Constitution does not apply to the State of Nevada? Once again, I think not.

II. THE FLAWED POSITION OF THE JUSTICE DEPARTMENT

The flawed position taken by the United States Justice Department is the power given to Congress under the Property Clause can be applied to the unappropriated public lands within any State. The Justice Department also takes the flawed position the Supremacy Clause operating in tandem with the Property Clause gives the Federal Government supreme power over these lands.

III. THE SUPREMACY CLAUSE

The Supremacy Clause, Art. VI, cl. 2 of the United States Constitution reads in part, "This Constitution, and the laws of the United States which shall be made in Pursuance thereof . . .". As such, in order for a Federal law to be supreme over a State law, that Federal law must be within the confines or limits of the United States Constitution. In defining the limits of the Supremacy Clause the Court did so quite eloquently in *Kansas v. Colorado*, 206 U.S. 46 (1906). The Court found in this case that the reclamation of arid lands not the property of the United States, nor situated within the limits of a territory, was not comprehended in the grant to Congress by the United States Constitution under the Property Clause. The Court further found that State laws in respect to the reclamation of arid lands cannot be overridden by Congress. Simply stated, under the Supremacy Clause, if Congressional legislation exceeds the power granted to Congress by the Constitution, that legislation does not override State legislation.

Applying simple logic, if the power granted to Congress under

the Property Clause cannot be applied to the unappropriated public lands within a State, the Supremacy Clause cannot be used to enforce that power.

IV. THE PROPERTY CLAUSE

The Property Clause, Art. IV, § 3, cl. 2 reads as follows: "The Congress shall have Power to dispose of and make all needed Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be construed as to Prejudice any Claims of the United States, *or af any particular state*.". (emphasis added.)

The cornerstone of the legal argument taken by the Justice Department to establish the Federal Government ownership of the unappropriated public lands is *Kleppe v. New Mexico,* 426 U.S. 529 (1976). In their legal position, the Justice Department has misread this ruling. The judgment in the *Kleppe* case was a declaratory judgment and was remanded back to the lower court. Therefore, the judgment in *Kleppe* is the law of the land, it is the opinion of the Court to be applied solely to the issue in the case and directed only at the two litigants. The ruling of the Court did not require the two litigants to do anything. In the *Kleppe* case the issue was stated by the Court as, "At issue in this case is whether Congress exceeded its powers under the Constitution in enacting the Wild Free-Roaming Horses and Burros Act.". The issue in the *Kleppe* case was Congress' power to enact legislation, not the constitutionality of the legislative act itself.

The issue in the *Kleppe* case is not about wild horses and burros, it is not about the Property Clause, and it is not about public lands. The issue in the *Kleppe* case establishes Congress' Constitutional right to enact any legislation, however, once that legislation is enacted, constitutionality can be challenged in court. The Court stated in its opinion in the *Kleppe* case, "In answering this question, we must remain mindful that, while courts must

eventually pass upon them, determinations under the Property Clause are entrusted primarily to the judgment of Congress.".

The Court goes on to say in the *Kleppe* case, "Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause.". The reading of this dicta cannot be construed in any way other than the State has jurisdiction over the public lands. But what does the Court say about Congress? The Court says that Congress may enact legislation. Nowhere in the *Kleppe* case does the Court say that the power granted to Congress under the Property Clause can be applied to the public lands in the State of New Mexico. No where in the *Kleppe* case does the Court say that the Federal Government has control over the public lands.

The portion of the Courts opinion in the *Kleppe* case that the Justice Department has misread or misinterpreted reads as follows: "And while the furthest reaches of the power granted by the Property Clause have not yet been definitely resolved, we have repeatedly observed that '[t]he power over the public lands entrusted to Congress is without limitations.' ". This statement is completely correct. In making the statement the Court cites from *United States v. San Francisco*, 310 U.S. 16 (1940); *Light v. United States*, 220 U.S. 523 (1911) and *United States v. Gratiot*, 14 Pet. 526 (1840).

The *Gratiot* case is the origin of this position and dealt with the State of Illinois. When Illinois was still a part of the original Territory, and before it became a state, the Federal Government issued lead mine leases. When Illinois became a State, Illinois laid claim to all of the land within its external boundaries and also claimed the leases. The Court rejected the second claim on the basis that the lead mine leases were issued while Illinois was still part of a territory and before it became a State. The Court said, "The term 'territory' as here used, is merely descriptive of one kind of property, and is the equivalent to the words 'lands'. And Congress has the same power over it as any other property

belonging to the United States; and this power is vested in Congress without limitations, and has been considered the foundation upon which the territorial governments rest." Clearly the power given to Congress under the Property Clause is applicable to a territory and not to a State.

Restriction of the power of the Property Clause to a territory is defined in *Dred Scott v. Sanford,* 60 U.S. 393 (1856). After the Revolutionary War, the thirteen colonies were in fact thirteen sovereign nations. They won their independence and in addition they won all of the unappropriated territory west of them to the Mississippi River. While the seven western colonies claimed that land, the six eastern colonies took the position that all of the colonies won the land in the course of the Revolutionary War, and that each colony had a claim to it. All the colonies finally agreed they would cede this land to the newly to-be-formed Confederation in order to pay off the debt of the Revolutionary War. They could do this because they were in fact thirteen sovereign nations. However, once this new Confederation was formed, each State lost a small piece of its sovereignty. A legal vehicle was therefore needed to carry out this agreement. That legal vehicle was the Property Clause, put into the Constitution specifically to carry out this agreement. In the *Dred Scott* case, the Court states in part, "It was intended for a specific purpose, to provide for the things we have mentioned. It was to transfer to the new government the property then held in common by the States, and to give to that government power to apply it to the objects for which it has been destined by mutual agreement among the States before their league was dissolved. It applied only to the property which the States held in common at that time, and has no reference whatever to any territory or other property which the new sovereignty might afterwards itself acquire." Quite clearly, the power granted to Congress by the Property Clause is only applicable to a territory and is not applicable to any State. *Dred Scott* goes on further in citing *Harcourt v. Gaillard,* 25 U.S. 523 (1827). After the signing of the Declaration of Independence, Great Britain made a land grant located within what is now Florida. Both South Carolina and Georgia laid claim to this land. The

Federal Government also claimed the land. The Court stated in the *Harcourt* case, "There was no territory within the United States that was claimed in any other right than that of some one of the confederate states; therefore, there could be no acquisition of territory made by the United States distinct from, or independent of some one of the states." Clearly, the Federal Government is restricted in its owning of public lands.

V. THE EQUAL FOOTING DOCTRINE

The *Title* to all unappropriated public lands within each State passed to that State upon its admission to the Union under the Equal Footing Doctrine. This doctrine was upheld in *Pollards Lessee v. Hagen*. In the *Pollards* case the Court states, "And the statute passed by Virginia authorizing her delegates to execute this deed, and which is recited in it, authorized them, in behalf of the state, by a proper deed to convey to the United States, for the benefit of said states, all the right, *Title*, and claim, as well of soil as jurisdiction, . . ." (emphasis added). The Court further states, "when the United States accepted the cession of the territory, they took upon themselves the trust to hold the municipal eminent domain for the new states, and to invest them with it, *to the same extent, in all respects*, that was held by the states ceding the territories," (emphasis added).

Again applying simple logic, if the original States passed *Title* to the Federal Government, they had to have held *Title*, you cannot give away something you do not have. Therefore when the new States entered the Union on an equal basis in all the same respects as the original States the new States gained *Title* to all the unappropriated public lands within their external boundaries. The Court further states in *Pollards*, "We think a proper examination of this subject will show, that the United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory, of which Alabama or any of the new states were formed."

In reading directly from the Virginia Act of Cession — 1783,

the Virginia Legislature states, "all right, title, and claim as well of soil as jurisdiction, which this commonwealth hath to the territory or tract of country within the limits of the Virginia charter, . . . ; and that the States so formed shall be distinct republican States, and admitted members of the Federal Union, having the same rights of sovereignty, freedom, and independence as the other States".

It is quite evident that the intent of the Virginia Legislature was to pass on to any and all States formed from the ceded territory *all* rights held by Virginia. This most certainly includes the right to claim *Title* to *all* lands, both wet and dry, that are within the external boundaries of the newly formed states.

The Equal Footing Doctrine was upheld in its entirety in *Coyle v. Smith,* 221 U.S. 559 (1910). The *Coyle* case dealt with the location of the state capital of Oklahoma, and the Court stated, "on her admission, she at once became entitled to and possessed of all rights of dominion and sovereignty which belonged to the original States." This dicta indicates that a State gains *Title* to all of the unappropriated public lands within its external boundaries upon admission into the Union, to the same extent, that the original States held *Title* to the lands within their external boundries.

In a later case, *Utah Division of State Lands v. United States,* 482 U.S. 193 (1987), the Court states, "Because all subsequently admitted States enter the Union on a 'equal footing' with the original thirteen States, they too hold *Title* to the land under navigable waters within their boundaries upon entry into the Union." (emphasis added).

In the *Phillips Petroleum Company and Cinque Bambini Partnership v. Mississippi and Saga Petroleum U.S. Inc.,* 484 U.S. 469 (1988), the Court ruled that all lands under water subject to the ebb and flow of the tide, regardless of whether such waters are navigable, are within the public trust given to the States upon their entry into the Union. The question asked in *Phillips* did not deal

with land beneath navigable waters, but with tidelands. *Phillips* further upheld the Equal Footing Doctrine in that it did not limit title to land under navigable waters and is in complete compliance with *Pollards* and *Coyle*.

However, in the dissenting opinion of that case, it was brought out that 150 years of title chain must be considered. This is most certainly a valid concern. However it is only necessary to follow the multitude of court decisions that have granted the Federal Government the right to reserve lands for many different purposes. That granting of power makes valid any claim to title by an individual obtaining land as a result of the Federal Government reserving that land.

VI. CONGRESS' RIGHT TO TAKE LAND BY CONDEMNATION

Congress has the right to take land by condemnation under the General Welfare Clause. This right was brought forward in *United States v. Gettysburg Electric Railway Company*, 160 U.S. 668 (1895). The *Gettysburg* case dealt with the taking of land, owned by a railroad, in order to preserve the battlefield of Gettysburg for the good of the nation as a whole.

In the *Gettysburg* case the Court states, "It is, of course, not necessary that the power of condemnation for such purpose be expressly given by the Constitution. The right to condemn at all is not so given. It results from the powers that are given, and it is implied because of its necessity, or because it is appropriate in exercising those powers. Congress has power to declare war and to create and equip armies and navies. It has the great power of taxation to be exercised for the common defense and general welfare." The Court goes on to say, "Such a use seems necessarily, not only a public use, but one so closely connected with the welfare of the Republic itself as to be within the powers granted Congress by the Constitution for the purpose of protecting and preserving the whole country."

This holding was observed in *Nixon v. Administrator of General Services,* 433 U.S. 425 (1977). In that case the Court states, "Similarly, Congress' interest in and expansive authority to act in preservation of monuments and records of historical value to our national heritage are fully established. *United States v. Gettysburg Electric R. Co.,* 160 U.S. 668." The right of Congress to take land by condemnation is further illustrated in *Charles Paul v. United States,* 371 U.S. 245 (1962). In the *Paul* case the Court states, "The power of the Federal Government to acquire land within a State by purchase or by condemnation without the consent of the State is well established. *Kohl v. United States,* 91 U.S. 367, 371, 23 L. Ed. 449, 451. But without the States 'consent' the United States does not obtain the benefits of Art. I, § 8, cl. 17, its possession being that of an ordinary proprietor." This decision clearly limits the Federal Government in its power to regulate lands that it has taken by condemnation or by reserving them. Those lands are subject to state legislation.

When Congress acted to take the land in the *Gettysburg* case by condemnation, it was in fact a true "taking". The Federal Government had to pay the railroad just compensation for the land it lost.

VII. CONGRESS CAN TAKE LAND BY RESERVING IT

Congress can also acquire land by reserving it. This was shown in the case of *Emil Grisar v. Irwin McDowell,* 73 U.S. 363 (1867). *Grisar* is a San Francisco case and dealt with San Francisco's right to select four square leagues of land of its choice. This right was obtained by San Francisco by Mexican law that was in effect at the time of conquest by the United States. That law allowed any pueblo to select any four square leagues of land of its choice.

The United States however desired a portion of the land selected by San Francisco to be used for a gun emplacement. Therefore that portion of the land to be used was withdrawn from the allowed four square leagues of land and another piece of land substituted.

In justifying its position the Court said, "Until this was done,

the government was not precluded from setting apart and *appropriating* any portions of lands claimed, which might be necessary for public uses." (emphasis added.) The Court further states, "But further than this: from an early period in the history of the government it has been the practice of the president to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses."

There are a large number of cases dealing with the right of the Federal Government to reserve lands; *Samuel G. Wolcott v. The Des Moines Navigation and Railroad Company*, 72 U.S. 681 (1866); *United States v. Midwest Oil Company,* 236 U.S. 459 (1914); *United States of America v. James E. O'Donnell,* 303 U.S. 501 (1937); *Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1941). These cases deal with a wide variety of land types and land uses. However the conclusion to be drawn from all these cases is that the Federal Government can, and has, in fact reserved large amounts of public lands for the general welfare of the nation as a whole. The Court has consistently upheld the Federal Government's right in the reserving of those lands.

This is also true in the case of *John E. Scott v. Charles P. Lattig,* 227 U.S. 229 (1912). In that case the dispute was over islands in a navigable river. Both the State and the Federal Government claimed ownership of the islands. The Court ruled in favor of the Federal Government. This was of course correct.

Indeed, it can be seen that all lands condemned or reserved by the Federal Government was allegedly done so for the general welfare of the nation as a whole. National Forests were reserved to supply a continuous supply of lumber for the nation. President Clinton in his recent taking of 1.7 million acres of land from the state of Utah, allegedly did so for our children and our grandchildren. The Federal Government can claim ownership of such lands, but when it does so it becomes a taking. That ownership is merely that of an ordinary proprietor.

VIII. THE RESERVING OF LANDS IS A TAKING

Since *Title* and not possession of all unappropriated public lands passed to the States, under the Equal Footing Doctrine, upon their entry into the Union, they have an absolute claim of title to any lands condemned or reserved by the Federal Government. Yet again applying simple logic, since title to all unappropriated public lands passed to the States upon statehood, but the Federal Government has the right to reserve some of those lands for public use, the reserving of those lands becomes a taking.

This reasoning is supported in *Block, Secretary of Agriculture v. North Dakota Board of University and School Lands*, 461 U.S. 273 (1983). In the *Block* case Congress claimed ownership to lands under a then non-navigable river. North Dakota claimed the river was navigable at the time North Dakota entered the Union and therefore title passed to North Dakota under the Equal Footing Doctrine. The Court held that the 12 year statute of limitations of the Quite Title Act was applicable to a State as well as it is to all others. The Court therefore ruled in favor of the United States.

The Court however does state in the opinion of the *Block* case:

> The State probably is correct in stating that Congress could not, without making provision for payment of compensation, pass a law depriving a State of land vested in it by the Constitution. Such a law would not run afoul of the equal-footing doctrine or the Tenth Amendment, as asserted by North Dakota, but would constitute a taking of the State's property without just compensation, in violation of the Fifth Amendment. Section 2409a(f), however, does not purport to strip any State, or anyone else for that matter, of any property rights. . . . If a claimant has title

> to a disputed tract of land, he retains title even if his suit to quiet his title is deemed time-barred under § 2409a(f). A dismissal pursuant to § 2409a(f) does not quiet title to the property in the United States. The title dispute remains unresolved. Nothing prevents the claimant from continuing to assert his title, in hope of inducing the United States to file its own quiet suit, in which the matter would finally be put to rest on the merits.

Although the holding in the *Block* case dealt with the applicability of the statute of limitations in the Quite Title Act to a State, the reasoning by the Court relative to "taking" is applicable to any act of Congress. The act of Congress could be the establishing of a National Forest, reserving a wilderness area, or any number of acts dealing with the reserving of lands and could result in a "taking", provided title to those lands passed to the State under the Equal Footing Doctrine. Congress certainly has the power to reserve lands, but when Congress does so, Congress must pay the State just compensation for the taking of those lands.

The Court has not ruled on all types of lands the Federal Government can or cannot reserve. The Court also has not ruled on what amounts of land the Federal Government can or cannot reserve. Until such time as the Court makes these rulings, the questions must remain unanswered.

CONCLUSION

For all of the reasons stated above, Amicus Curiae respectfully requests this Honorable Court to reverse the decision of the appeals court and grant the relief sought by Cliff Gardner and Bertha Gardner.

Respectfully submitted,

JOHN W. HOWARD
Counsel of Record
Attorney for Amicus Curiae
David Haight
625 Broadway
Suite 1206
San Diego, California 92101
(619) 234-2842